

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

LARRY BANKS,

Petitioner,

v.

STU SHERMAN,

Respondent.

Case No. 1:20-cv-01225-DAD-EPG-HC

ORDER DENYING PETITIONER'S  
MOTION FOR DEFAULT

(ECF No. 18)

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On November 10, 2020, Respondent filed a motion to dismiss the petition. (ECF No. 11). On January 8, 2021, the Court received the instant motion for default, in which Petitioner argues that Respondent did not comply with this Court's order because Respondent filed a motion to dismiss instead of an answer addressing the merits of Petitioner's claims. (ECF No. 18).

In the September 10, 2020 order to respond, the Court ordered in pertinent part:

1. Within **SIXTY (60) days** of the date of service of this order, Respondent SHALL FILE a RESPONSE to the Petition. See Rule 4, Rules Governing Section 2254 Cases; Cluchette v. Rushen, 770 F.2d 1469, 1473-74 (9th Cir. 1985) (court has discretion to fix time for filing a response). A Response can be made by filing one of the following:

- A. AN ANSWER addressing the merits of the Petition. Any argument by Respondent that Petitioner has

1 procedurally defaulted a claim SHALL BE MADE in the  
2 ANSWER, but must also address the merits of the claim  
asserted.

3 B. A MOTION TO DISMISS the Petition.

4 (ECF No. 6 at 1–2).

5 As the Court’s order permitted Respondent to file a motion to dismiss rather than an  
6 answer, the Court finds that default is not warranted. Accordingly, the Court HEREBY ORDERS  
7 that Petitioner’s motion for default (ECF No. 18) is DENIED.

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9 IT IS SO ORDERED.

10 Dated: January 12, 2021

11 /s/ Eric P. Groj  
12 UNITED STATES MAGISTRATE JUDGE  
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